

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PACE AIR FREIGHT, INC.

Respondent

and

Case 25–CA–261402

TRACIE ELDRIDGE, an Individual

Charging Party

SUPPLEMENTAL DECISION AND ORDER GRANTING MOTION TO DISMISS

On October 12, 2021, I issued my decision in this case dismissing the complaint alleging that Respondent had violated Section 8(a)(1) of the Act by terminating employee Tracie Eldridge for engaging in protected concerted activity—discussing with other employees that Respondent “did not properly assign routes to employees,” and complaining about that to Respondent. No exceptions were filed to that decision and, on November 15, 2021, the Board issued an order adopting my decision.

On November 16, 2021, the Board referred to me Respondent’s Application for Award of Fees and Expenses pursuant to the Equal Access to Justice Act (EAJA) and Sections 102.143 through 102.155 of the Board’s Rules and Regulations. On December 16, 2021, the General Counsel filed a motion to dismiss the application because the Respondent failed to list relevant information with respect to its affiliates, including the majority shareholder and his affiliates, improperly included depreciation, and failed to establish its net worth as of the date of the complaint. On January 6, 2022, Respondent filed a response to the motion to dismiss, asserting that the information provided met all necessary requirements and attaching a supplemental affidavit in support of its position. On January 19, 2022, The General Counsel filed a response to my order to show cause supporting its motion to dismiss, emphasizing Respondent’s failure to provide information as to the net worth and employee complement of its affiliates, including Respondent’s owner and majority stockholder. As shown below, I agree with the General Counsel on the latter point and therefore dismiss the application for fees and expenses.

It is clear that the party filing the application bears the burden of proving its financial eligibility for fees under EAJA. See *Pacific Coast District Council (Foss Shipyards)*, 295 NLRB 156, 157 (1989). Section 102.143(g) of the Board’s Rules and Regulations requires that the net worth and the number of employees of the applicant and its affiliates must be aggregated to determine the eligibility of an applicant for EAJA fees and expenses. “Affiliates” under this rule include an “individual” who “directly or

indirectly controls or owns a majority of the voting shares” of the applicant. See *Kut-Kwick Corp.*, 273 NLRB 838, 839-840 (1984). Indeed, Section 102.147(f) of the Board’s Rules and Regulations requires the applicant to list all affiliates in its application. This is so the General Counsel has the opportunity to investigate the matter of affiliates. As the General Counsel asserts, once the issue of affiliates is raised, it is the applicant’s burden to show that control of affiliates and aggregation is inappropriate. See *Teamsters Local 741 (A.B.F. Freight)* 321 NLRB 886, 889 (1996). This is because the purpose of EAJA is to limit its reach only “to those persons and small businesses for whom costs may be a deterrent to vindicating their rights.” The “intended beneficiaries” do not include those who “meet the eligibility standard only because of legal or corporate form while having access a large pool of resources from affiliated companies.” *Id.* at 888-889, quoting from *Noel Produce*, 273 NLRB 769 (1984).¹

The General Counsel’s motion to dismiss asserts that the application for fees does not include, as it should, the net worth and number of employees of its affiliates, including those of its owner and major stockholder. More particularly, the General Counsel asserts that Robert Pfeffer is the owner and majority stockholder of Respondent and that his holdings must be aggregated with that of the Respondent. The motion asserts as follows at pages 5-6:

Robert E. Pfeffer appears to be an individual with a controlling share in Respondent, as he is listed as the company’s owner on the balance sheet submitted with Respondent’s Application and Respondent’s website [footnote citation to Pace Air Freight, “Our Team,” <https://www.paceairfreight.com/about-us> (last accessed December 15, 2021)]. The company’s most recent business entity report filed with the Indiana Secretary of State lists Robert and Nancy Pfeffer as the president and secretary, respectively, with no other corporate principals. See Exhibit A. Additionally, the Indiana Secretary of State’s website shows that Pace Equipment Leasing, Inc., is a domestic for-profit corporation with Robert Pfeffer listed as president, Robert Pfeffer, Jr. as vice president, and Jonathan Pfeffer as the secretary. See Exhibit B. According to a March 2020 article published in the Indianapolis Business Journal, another Pfeffer-controlled affiliate named Pace Property Holding LLC recently bought 200 acres of land near the Indianapolis airport to build a “life- science business park.” See Exhibit C.

In its response, Respondent does not dispute that Robert Pfeffer is the owner and majority stockholder of Respondent. Nor does Respondent contest the supporting documents cited by the General Counsel in support of its view that Pfeffer is indeed an affiliate and controls two other named corporations that are also affiliates. Instead, Respondent evades the point and erroneously asserts that the General Counsel attempts simply to make any stockholder an affiliate. See Response at p. 8. That, of course, is not the General Counsel’s position. The General Counsel’s position

¹ Respondent asserts that the Board’s rule cited above is an improper interpretation of the legislation authorizing EAJA fees and that circuit courts have not approved the broad reading set forth in the Board rule. But I am bound to follow the Board rule and the Board’s own application of that rule in its case law.

represents an accurate reading of the Board's rule and the supporting case law. I therefore find that Pfeffer is indeed an affiliate of Respondent. And since his net worth and employee complement and those of the other corporate entities he controls, Pace Equipment Leasing Inc. and Pace Property Holding LLC, were not provided, the EAJA application is fatally flawed. Nor does the supplemental affidavit attached to the Respondent's response rescue the application. It states that Respondent has no ownership interest in Pace Properties LLC and vice-versa and that it has no affiliated operating companies, whatever the word "operating" means. There is no reference in that affidavit to the owner of Respondent, Robert Pfeffer. It is clear that, under Board law, Pfeffer, as owner and majority stockholder of Respondent, is an "affiliate," whose information and holdings are required to be part of the application. Since they were not the motion to dismiss must be granted.²

For the above reasons and those stated in more detail in the General Counsel's motion to dismiss and the General Counsel's response to my order to show cause, I grant the motion to dismiss and dismiss the Respondent's application for EAJA fees and expenses.³

It is so ORDERED

Dated at Washington, D.C., January 28, 2022.



Robert A. Giannasi
Administrative Law Judge

² Even if Respondent had not understood the reference in the applicable Board rule regarding the meaning of "affiliates," the General Counsel's motion to dismiss made it quite clear that Pfeffer was an affiliate and his information was to be provided.

³ Under Section 102.150 of the Board's Rules and Regulations, review of this order may be obtained by filing a request under Section 102.27 of the Rules.